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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAYMON GRIGGS, Defendant and Appellant.	F070410 (Kern Super. Ct. No. SC083357B) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Robert Navarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna, Ivan Mars, and William K. McKim, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

In 2002, appellant/defendant Raymon Griggs (appellant) was convicted after a jury trial of two felony drug offenses, felon in possession of a firearm, and felon in possession of ammunition with two prior strike convictions. He was sentenced to the third strike term of 25 years to life plus one year.

In 2014, appellant filed a petition for recall of his third strike sentence pursuant to Proposition 36, the Three Strikes Reform Act of 2012 (the Act). (Pen. Code, § 1170.126).[1] Appellant argued he was eligible for resentencing because he was not convicted of serious or violent felonies. The People filed opposition and argued appellant was ineligible because he was "armed with a firearm" in the commission of the underlying offenses. (See, e.g., *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1051 (*Blakely*).)

The People asked the superior court to take judicial notice and review the probation report, police reports, preliminary hearing transcript, and this court's appellate opinion which affirmed appellant's convictions in a partially published opinion that did not include any factual statement about the underlying offenses. The People asked the court to take judicial notice of the trial transcript but did not present the court with that transcript.

The superior court relied on the preliminary hearing transcript, found appellant was ineligible for resentencing because he was armed with a firearm during the commission of the underlying offenses, and denied the petition.

On appeal, appellant argues the court improperly relied on the preliminary hearing transcript to find he was armed with a firearm because his convictions resulted from a jury trial.

We agree and remand the matter for further appropriate proceedings.

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[1] All further statutory citations are to the Penal Code unless otherwise indicated.

PROCEDURAL AND FACTUAL HISTORY

As we will explain, the record for this appeal from the superior court's denial of appellant's petition for recall does not include the facts adduced at appellant's jury trial which resulted in his 2002 convictions. We will thus review the procedural history of appellant's 2002 case, his 2014 petition for recall, and the exhibits which were before the superior court when it denied appellant's petition.

Convictions and sentence

On February 6, 2002, appellant was convicted after a jury trial of transportation or sale of marijuana (Health & Saf. Code, § 11360, subd. (a)); possession of marijuana for sale (Health & Saf. Code, § 11359); possession of a firearm by a felon (former § 12021, subd. (a)(1)); and possession of ammunition by a felon (former § 12316, subd. (b)(1)).

The court found true the allegations that appellant had two prior strike convictions: assault with a firearm (§ 245, subd. (a)(1)), with an enhancement for personal use of a firearm (§ 12022.5); and shooting at an inhabited dwelling or vehicle (§ 246), with both prior convictions resulting from the same case in 1998.

On March 7, 2002, the court partially granted appellant's request pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, and dismissed the two prior strike convictions alleged for appellant's two drug offenses. However, the court declined to dismiss the prior strike convictions found true for appellant's convictions for felon in possession of a firearm and ammunition.

According to appellant's petition for recall, appellant was sentenced to 25 years to life for possession of a firearm by a felon; a consecutive term of four years for transportation or sale of marijuana, with all but one year stayed; and the terms for the other convictions were stayed pursuant to section 654.

This court's appellate opinion

As we will explain below, the People presented the superior court with the appellate opinion affirming appellant's convictions as an exhibit to its opposition to

appellant's petition. In *People v. Griggs* (2003) 110 Cal.App.4th 1137, this court filed a partially published opinion, and rejected appellant's claims of instructional error and ineffective assistance. The published portion of the opinion did not include any factual statement. It stated that appellant was convicted of being a felon in possession of a firearm and ammunition and certain drug offenses. It also stated appellant and "a codefendant" were tried together, but did not identify the codefendant or explain the disposition of his case. The published portion of the opinion did not address appellant's possession of a gun or whether he was armed. (*Id*. at p. 1138.)

The People did not introduce the nonpublished portion of the opinion, and it is not contained in the appellate record before this court.

APPELLANT'S PETITION FOR RECALL

On August 7, 2014, appellant filed a petition to recall his third strike sentence of 25 years to life. Appellant argued he was eligible for resentencing under Proposition 36 because he was not convicted of serious or violent felonies. Appellant's petition did not state any facts underlying his 2002 convictions. Instead, appellant summarized the procedural history of his 2002 convictions and third strike sentence. Appellant asked the superior court to take judicial notice of its own records for his prior convictions.

The People's opposition

On August 19, 2014, the People filed opposition to appellant's petition for recall and argued he was ineligible for resentencing because he was "armed with a firearm" during the commission of the underlying offenses, within the meaning of the Act. The People's opposition set forth the following factual basis for appellant's convictions:

> "On November 13, 2001, officers responded to an assault with a deadly weapon/spousal assault call in which [appellant] was named as the suspect. A warrant was issued for his arrest. Officers learned that [appellant] was driving a red Geo Metro rented from Enterprise Rent-A-Car. On November 14, 2001, officers asked employees of Enterprise Rent-A-Car to call police if [appellant] returned the car to that location. On November 15, 2001, officers were notified from Enterprise Rent-A-Car that [appellant] had

> returned the car to that location. When officers arrived, they learned that [appellant] had fled the scene in a four-door Subaru. Officers located that car and conducted a traffic stop. [Appellant] was arrested for his warrant. The driver of the car was Jesse West, who was on state parole. Sherene Gibson was in the rear seat of the car. *During a search of the car officers located, inter alia, clothing in the trunk of the car, [appellant's] wallet containing identification for him, and a black fanny pack containing a loaded 9mm Lorcin handgun.* Underneath the fanny pack, officers located two clear baggies containing approximately one pound each of marijuana shaped into a brick." (Italics added.)

The probation report, which the People submitted as an exhibit, stated that appellant, West, and Gibson were taken into custody for conspiracy to transport and sell marijuana, and conspiracy to possess a firearm.

The People argued appellant was ineligible for resentencing under the Act because he was armed with a firearm during the commission of the underlying offenses, within the meaning of section 667, subdivision (e)(2)(C)(iii), based on the gun found in the fanny pack in the trunk.

The People did not cite to a record or source for the above-quoted factual statement for appellant's 2002 convictions. However, the People argued the superior court could look to the entire record of conviction to find appellant was armed with a firearm and ineligible for resentencing, and the record of conviction included the charging documents, the preliminary hearing transcript, the trial transcripts, and the appellate opinion.

The People's exhibits

In support of its opposition, the People filed a motion for the court to take judicial notice of the following documents which constituted the "record of conviction" to find appellant was ineligible for resentencing: the probation report from the 2002 convictions; the police reports from appellant's arrest which led to the 2002 convictions; the CLETS records of appellant's criminal history; this court's partially published appellate opinion

which affirmed appellant's convictions but omitted any factual statement for the offenses; and the preliminary hearing transcript from his 2002 case.

In addition, the People asked the court to take judicial notice of "the entire court file" and "the trial transcript in deciding these issues if it is necessary. The trial transcript is also part of the record of conviction. *However, the People do not have a copy of the trial transcript to submit to the Court.*" (Italics added.)

The People did not submit the transcript from appellant's 2002 jury trial for the court to consider. The People did not assert the transcript could not be found or produced, or that it did not address evidence as to whether appellant was armed with a firearm.[2]

We turn to a few relevant documents in the People's exhibits.

Preliminary hearing evidence

The transcript of the preliminary hearing indicates that appellant, Sharene Gibson, and Jesse West had been charged together with various offenses after the traffic stop. The prosecutor advised the court that Gibson admitted that she violated probation, and all charges against her were dismissed. Thereafter, the court proceeded with the preliminary hearing for appellant and West.

At the preliminary hearing, Jeanetta Pollard (Pollard) testified that on November 13, 2001, she was in a dating relationship with appellant. She called the police because she argued with appellant and it escalated into a physical altercation. Appellant grabbed his clothes and drove away in a red Geo Metro. Pollard testified the previous night, appellant produced a handgun when he heard noises outside the house. She had never seen him with a gun before.

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[2] In addition, the People quizzically requested the court to take judicial notice of the "factual basis of the plea" and the "sentencing transcript" because they would "likely show that [appellant] used and was armed with a firearm." The limited record before this court implies appellant was convicted after a jury trial, and not as a result of a plea.

Officer Terry Wainwright, who interviewed Pollard, testified Pollard said appellant left in his rented vehicle and she ran outside to get the license plate. Pollard said appellant brandished a gun, and she ran back into the house and locked the door because she was afraid he would kill her.

Detective Jeffrey Watts testified he went to the rental car agency to track appellant's vehicle. Watts asked the employees to call him when appellant returned the rental car. On November 15, 2001, an employee from the rental car agency reported that appellant had returned the rental car. The employee said appellant left in a tan four-door car and provided the license plate number.

Later on November 15, 2001, patrol officers stopped the tan vehicle. Detective Watts testified appellant was sitting in the front passenger seat; Jesse West (West) was the driver; and Sharene Gibson was sitting in the back seat. There were several items of property in the back seat. Watts asked West about this property, and West said they belonged to appellant. West said appellant asked him for a ride home. Gibson said the items in the back seat and trunk belonged to appellant.

Detective Watts testified he searched the trunk of the car and found several layers of clothes. There was a black jacket in the pile of clothes, and it contained a wallet with appellant's identification card.

Detective Watts testified he found a fanny pack under that jacket and the other items of clothes. The fanny pack contained a loaded nine-millimeter firearm. A blue plastic bag was next to the jacket and the fanny pack. The bag contained two clear Ziploc bags with approximately one pound of marijuana.

West had a plastic bag in his pocket which held four individual baggies, each of which contained 1.5 grams of marijuana, consistent with being packaged for sale. West had another bag in his pocket with 23 grams of marijuana. Appellant had $852, and West had $414, all in small denominations.

At the conclusion of the preliminary hearing, the court held both appellant and West to answer for count I, transportation of marijuana (Health & Saf. Code, section 11360, subd. (a)); and count II, possession of marijuana for sale (Health & Saf. Code, § 11359). West was separately held to answer for count III, felon in possession of a firearm.

Appellant was separately held on count IV, assault with a deadly weapon, based on Pollard's testimony and the weapon found in the trunk; count V, criminal threats against Pollard; and count VI, felon in possession of a firearm.

The probation report

As we will discuss below, hearsay statements in the probation report are not part of the record of conviction. However, the probation report from appellant's 2002 convictions suggests additional details about appellant's convictions.

The probation report states appellant and West were tried together in a joint jury trial, and the verdicts were returned on February 6, 2002. Appellant was convicted of count I, transportation or sale of marijuana (Health & Saf. Code, § 11360, subd. (a)); count II, possession of marijuana for sale (Health & Saf. Code, § 11359); count IV, possession of a firearm by a felon (former § 12021, subd. (a)(1)); and count IX, possession of ammunition by a felon (former § 12316, subd. (b)(1)), with two prior strike convictions.

The probation report further states that the jury found appellant not guilty of counts V and VI, assault with a deadly weapon (§ 245, subd. (a)(1)); count VII, assault with a firearm (§ 245, subd. (a)(2)); and count VIII, criminal threats (§ 422), and a personal use enhancement was found not true (§ 12022.5, subd. (a)). The probation report does not clarify the basis for these charges but they were presumably based on Pollard's allegations.

Finally, the probation report states the jury found West not guilty of all counts, but it does not identify the charges that were filed against West.

DENIAL OF APPELLANT'S PETITION FOR RECALL

On October 28, 2014, the superior court held a hearing on appellant's petition for recall of his third strike sentence. The superior court acknowledged that the prosecutor submitted documentary exhibits in support of its opposition to the petition, including this court's partially published appellate opinion which affirmed appellant's 2002 convictions. The court advised the parties that the partially published portion of the opinion did not include any statement of facts, and the nonpublished portion was not an exhibit. The prosecutor replied that she also submitted the preliminary hearing transcript to prove that appellant was ineligible for resentencing under the Act. The prosecutor did not submit the nonpublished portion of the opinion.

Appellant's counsel argued the court could not find he was armed with a firearm since such an enhancement was not alleged or found true in his case, and he was entitled to a jury trial on such a determination.

The court denied appellant's petition for recall and found he was ineligible for resentencing because he was armed with a firearm when he committed the 2002 offenses. The court's ruling was solely based on the preliminary hearing transcript:

> "I have considered the preliminary hearing transcript. The People have asked I take judicial notice of the trial transcript. I don't have that available to me. I think it's an appropriate request but I don't have that available to me. I think I can rely on the preliminary hearing transcript and the nature of the charges. If it's necessary in the future I will certainly look at the trial transcript and the unpublished portion of the [appellate] opinion which I don't have. I just have the published portion that was submitted."

DISCUSSION

On appeal, appellant asserts the court's denial of his petition for recall must be reversed because it did not rely on the entire record of conviction when it found he was "armed with a firearm" in the commission of the underlying offense. Appellant argues that the court should have considered the transcript of his 2002 jury trial to make that determination.

Under the Three Strikes Reform Act of 2012 (the Act), "a prisoner currently serving a sentence of 25 years to life under the pre-Proposition 36 version of the Three Strikes law for a third felony conviction that was not a serious or violent felony may be eligible for resentencing as if he or she only had one prior serious felony conviction. [Citations.]" *(People v. White* (2014) 223 Cal.App.4th 512, 517 (*White*); § 1170.126, subd. (e).)

"Upon receiving a petition for recall of sentence under this section, *the court shall determine* whether the petitioner satisfies the criteria" set forth in section 1170.126, subdivision (d). (§ 1170.126, subd. (f), italics added.) "If the petitioner satisfies" the statutory criteria, "the petitioner shall be resentenced … unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (*Ibid*.)

As relevant to this case, an inmate is ineligible for resentencing under the Act "if, inter alia, '[d]uring the commission of the current offense, the petitioner used a firearm, was *armed with a firearm* or deadly weapon, or intended to cause great bodily injury to another person.' [Citations.]" (*Blakely, supra*, 225 Cal.App.4th at p. 1051, italics added; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312; § 1170.120, subd. (e)(2); § 667, subd. (e)(2)(C)(iii); § 1170.12, subd. (c)(2)(C)(iii).)

"A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively. [Citations.]" (*People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*), italics in original; *Blakely, supra,* 225 Cal.App.4th at pp. 1051–1052; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*).) " '[I]t is the availability – the ready access – of the weapon that constitutes arming.' [Citation.]" (*Bland, supra,* 10 Cal.4th at p. 997.)

A third strike inmate "may be found to have been 'armed with a firearm' in the commission of his or her current offense, so as to be disqualified from resentencing under the Act, even if he or she did not carry the firearm on his or her person." (*People v.*

Superior Court (*Martinez*) (2014) 225 Cal.App.4th 979, 984–985, 992–993 [defendant had firearm available for immediate use and was armed when he was arrested in kitchen, and guns were found in adjacent bedroom and a closet]; *People v. Superior Court* (*Cervantes*) (2014) 225 Cal.App.4th 1007, 1011–1014 [defendant armed with a firearm when police searched his house while he stood in front doorway, and found loaded handgun in wife's purse located in bedroom]; *People v. Elder*, *supra*, 227 Cal.App.4th 1308, 1317 [defendant armed with a firearm when his apartment was searched while he was standing outside, and guns were found on shelf of entertainment center and in unlocked bedroom safe].)

Appellant filed his petition for recall and resentencing because he received a third strike term for his conviction for being a felon in possession of a firearm in violation of former section 12021. Such a conviction does not automatically disqualify appellant from resentencing under the act unless he was armed, i.e., he had the firearm available for offensive or defensive use. (*Blakely*, *supra*, 225 Cal.App.4th at pp. 1048, 1052; *Osuna*, *supra*, 225 Cal.App.4th at pp. 1031–1032.) "[W]hile the act of being armed with a firearm … necessarily requires possession of the firearm, possession of a firearm does not necessarily require that the possessor be armed with it." (*White*, *supra*, 223 Cal.App.4th at p. 524.)

However, an eligibility determination is not limited to a review of the particular statutory offenses and enhancements of which the inmate was convicted. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332 (*Bradford*).) "Rather, the court may examine relevant, reliable, admissible portions of the *record of conviction* to determine the existence or nonexistence of disqualifying factors. [Citation.]" (*Blakely*, *supra*, 225 Cal.App.4th at p. 1063, italics added.) The facts needed to adjudicate eligibility must be taken solely from the record of conviction. (*Bradford*, *supra*, 227 Cal.App.4th at p. 1327; *People v. Burnes* (2015) 242 Cal.App.4th 1452, 1458.) "Where … the record shows that a defendant convicted of possession of a firearm was armed with the firearm during the

commission of that offense, the armed with a firearm exclusion applies and the defendant is not entitled to resentencing relief under the Act." (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 797 (*Brimmer*).)

In filing a petition for recall, the petitioning inmate has the initial burden of establishing eligibility, i.e., at a minimum, the requisite conviction and sentence set forth in section 1170.126, subdivision (e)(1). (§ 1170.126, subds. (b), (f).) The prosecution then has the opportunity to oppose the petition by establishing the petitioning inmate is ineligible for resentencing pursuant to the statutory grounds. (§ 1170.126, subd. (e); *People v. Johnson* (2016) 1 Cal.App.5th 953, 964–965.)

"Because a determination of eligibility under section 1170.126 does not implicate the Sixth Amendment, a trial court need only find the existence of a disqualifying factor by a preponderance of the evidence. [Citations.]" (*Osuna, supra,* 225 Cal.App.4th at p. 1040.)[3] "The factual determination of whether the felon-in-possession offense was committed under circumstances that disqualify defendant from resentencing under the Act is analogous to the factual determination of whether a prior conviction was for a serious or violent felony under the three strikes law. Such factual determinations about prior convictions are made by the court based on the *record of conviction*. [Citation.]" (*People v. Hicks* (2014) 231 Cal.App.4th 275, 286 (*Hicks*), italics added.)

On appeal, we review the superior court's factual determination that appellant was armed with a firearm when he committed the offense of felon in possession of a firearm based on the substantial evidence standard. (*Hicks, supra*, 231 Cal.App.4th at p. 286.)[4]

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[3] Cf. *People v. Arevalo* (2016) 244 Cal.App.4th 836, 852–853 [superior court must find beyond a reasonable doubt the existence of a factor rendering defendant ineligible for resentencing under the Act; a petition for review was not filed], disagreed with by *People v. Frierson* (2016) 1 Cal.App.5th 788, 793–794 [*Arevalo* wrongly decided; preponderance of the evidence standard is applicable to prove defendant ineligible for resentencing under the Act].)

[4] The People assert appellant failed to object to the court's reliance on the preliminary hearing transcript, and thus forfeited appellate review of the question of

The record of conviction

The question in this case is whether the superior court considered the "entire record of conviction" when it found appellant was ineligible for resentencing under the Act and denied his petition for recall. (*People v. Guerrero* (1988) 44 Cal.3d 343, 355; *Bradford*, *supra*, 227 Cal.App.4th at p. 1338; *Blakely*, *supra*, 225 Cal.App.4th at p. 1063; *Hicks*, *supra*, 231 Cal.App.4th at p. 286.)

The record of conviction includes the preliminary hearing transcript (*People v. Reed* (1996) 13 Cal.4th 217, 224–229; *People v. Trujillo* (2006) 40 Cal.4th 165, 180; *People v. Gonzales* (2005) 131 Cal.App.4th 767, 773–775); the accusatory pleading and the transcript of a defendant's plea underlying the prior conviction (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1045); the transcript of the defendant's jury trial (*Brimmer*, *supra*, 230 Cal.App.4th at pp. 800–801); and the appellate record, including both published and nonpublished appellate opinions (*People v. Woodell* (1998) 17 Cal.4th 448, 456–457; *People v. Trujillo*, *supra*, 40 Cal.4th at pp. 180–181; *People v. Elder*, *supra*, 227 Cal.App.4th at p. 1317; *Osuna*, *supra*, 225 Cal.App.4th at p. 1030; *Brimmer*, *supra*, 230 Cal.App.4th at pp. 800–801; *Hicks*, *supra*, 231 Cal.App.4th at p. 286.)

The record of conviction does not generally include police reports (*Draeger v. Reed* (1999) 69 Cal.App.4th 1511, 1521; *Moles v. Gourley* (2003) 112 Cal.App.4th 1049, 1060), the defendant's statements made after conviction and recounted in a postconviction report of the probation officer, or a hearsay account of the facts of defendant's offenses summarized in the probation report (*People v. Trujillo*, *supra*, 40 Cal.4th at pp. 179–180; *People v. Reed*, *supra*, 13 Cal.4th at pp. 230–231; *People v.*

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whether the superior court should have instead reviewed the trial transcripts to determine whether he was armed with a firearm. However, we are called upon to determine whether there is substantial evidence to support the superior court's factual determination that appellant was armed with a firearm and thus ineligible for resentencing. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 262 [defendant cannot waive his right to challenge the sufficiency of the evidence on whether a prior conviction was a serious felony].)

Burnes, supra, 242 Cal.App.4th at pp. 1459–1460; *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 5, 10).

Even when a document is part of the record of conviction, it is not automatically relevant or admissible for a particular purpose. (See *People v. Trujillo, supra,* 40 Cal.4th at pp. 179–181; *People v. Woodell, supra,* 17 Cal.4th at p. 457.) Moreover, its admission must comport with the rules of evidence, particularly the hearsay rule and exceptions thereto. (See *People v. Woodell, supra,* 17 Cal.4th at p. 457–461; *People v. Reed, supra,* 13 Cal.4th at pp. 220, 230–231.)

Analysis

Appellant filed his petition for recall and asserted he should be resentenced under the Act because he was not convicted of serious or violent felonies in 2002.

The People filed opposition and argued appellant was ineligible because he was "armed with a firearm" as defined by the Act. In support of its opposition, the People asked the court to take judicial notice of the probation report, police reports, and CLETs reports from appellant's 2002 convictions. These documents are not part of the record of conviction and cannot be the basis for the court's determination of his eligibility for resentencing under the Act.

This court's opinion which affirmed appellant's 2002 convictions is part of the record of conviction. However, the People only submitted the published part of the opinion, which did not contain a factual statement. The People did not file the nonpublished portion of the opinion, which might have set forth the facts adduced at appellant's jury trial.

The People also submitted the preliminary hearing transcript. It is well settled that a preliminary hearing transcript is part of the entire record of conviction. (*People v. Reed, supra,* 13 Cal.4th at pp. 224–229.) In this case, however, appellant's convictions did not result from a plea, but occurred after a jury trial in which he was convicted of

some offenses and acquitted of others, while West, his codefendant, was acquitted of all charges.[5]

In *People v. Houck* (1998) 66 Cal.App.4th 350 (*Houck*), the prosecution alleged the defendant had two prior strike convictions. One strike allegation was based on his prior conviction, after a jury trial, for assault with a deadly weapon or by means of force likely to produce great bodily injury.[6] The prosecution introduced the preliminary hearing transcript, plus certified copies of the amended information, verdicts, and judgment from the prior convictions. The court overruled the defendant's objections and relied on the preliminary hearing transcript. It found the prior conviction was for assault with a deadly weapon and a serious felony. (*Id*. at pp. 353–355.)

Houck held the court improperly relied upon the preliminary hearing transcript under the circumstances:

> "Considerations of reasonableness and fairness dictate that a 'record of conviction' include only those documents that reliably reflect the conduct of which a defendant was convicted. *Because the prior conviction in this case resulted from a jury verdict, it is clear that the preliminary hearing transcript is not reliable as to what evidence was presented to, or relied on by, the jury in reaching its verdict*. Further, the prosecution offers no explanation as to why use of this less reliable information is necessary or appropriate. Requiring that the prosecution produce evidence that was actually presented to the trier of fact is not unduly burdensome, promotes fairness and precludes the possibility that the underlying conduct will effectively be relitigated through the presentation of information that may

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[5] As noted above, the People's opposition also requested the superior court to take judicial notice of the "factual basis of the plea" and the "sentencing transcript" because they would "likely show that [appellant] used and was armed with a firearm." We presume this request was mistakenly included in the People's points and authorities.

[6] At the time of the proceedings in *Houck*, assault with a deadly weapon or force likely to produce great bodily injury in violation of section 245 was not classified as a serious or violent felony. In order to prove such a conviction was a strike, the prosecution had to establish the defendant personally used a dangerous or deadly weapon, or personally inflicted great bodily injury on the victim. Section 245 was subsequently amended. (See, e.g., *People v. Leng* (1999) 71 Cal.App.4th 1, 9; *People v. Puerto* (2016) 248 Cal.App.4th 325, 330.)

> not have been produced at trial. Because the preliminary hearing transcript is not necessarily an accurate reflection of what occurred at the trial, it is not part of the 'record of *conviction*' in accordance with *Guerrero.*" (*Houck*, *supra*, 66 Cal.App.4th at pp. 356–357, first italics added, second italics in original, fn. omitted.)

Houck noted it was not clear "whether the witnesses who testified at the preliminary hearing also testified at trial. Assuming that they did so, it is not established that the testimony was identical in both settings." (*Houck*, *supra*, 66 Cal.App.4th at p. 356 & fn. 1.)

> "The application of the 'reliable reflection' test from *Reed*, rather than the more technical definition of the record previously applied, would not likely require a different result in the cases cited above. In those cases, the courts were addressing the definition of 'record of conviction' where the prior conviction had resulted from a guilty plea rather than a trial. As in *Reed*, the admissibility of certain documents within the technical definition of the record would also fall within the category of documents providing a reasonable reflection of the conduct to which the defendant had pled guilty. [Citation.]" (*Id.* at p. 357.)

Houck rejected the People's argument that defendant had the opportunity "to introduce evidence from the trial to establish that he did not use a deadly weapon in committing the crime," and held the prosecution improperly relied on the preliminary hearing transcript to establish the nature of the prior conviction "when more reliable evidence (i.e., the trial transcript) is available for that purpose." (*Houck*, *supra*, 66 Cal.App.4th at p. 357.) It remanded the matter for another hearing on the prior strike conviction. (*Id*. at p. 358.)

We find there was insufficient evidence adduced at the hearing on appellant's petition to support the superior court's finding that he was ineligible for resentencing. While the probation report is not part of the record of conviction, it states that appellant's convictions and third strike sentence resulted from a jury trial in which he was also acquitted of certain offenses. The probation report also states that his codefendant, who

was driving the car, was apparently acquitted of all charges, raising the implication that appellant was found in sole possession of the firearm in the car trunk.

But we only know these additional circumstances based on the hearsay within the probation report. While the preliminary hearing transcript is part of the record of conviction, appellant did not enter a plea but was convicted after a jury trial. It is not unduly burdensome to require the People to produce either the transcript of appellant's jury trial or the entirety of this court's appellate opinion, for the superior court to determine whether appellant's petition for recall should be granted or denied.

In reaching this conclusion, we note it would be appropriate for the superior court to rely on the preliminary hearing transcript to decide appellant's petition for recall under certain circumstances since it is still part of the entire record of conviction. It would be logical to rely on other admissible parts of the record of conviction if the jury trial transcript has been destroyed or is otherwise unavailable, the issue of whether appellant was armed was not directly addressed at his jury trial, or the entirety of the appellate opinion fails to state the facts for the underlying charges.

Accordingly, we remand the matter to the superior court for a new hearing and determination on appellant's eligibility, at which only relevant, reliable, and admissible portions of the record of conviction are considered, including the jury trial transcript and/or the unpublished portion of this court's appellate opinion which affirmed his convictions.[7] If the court again finds appellant disqualified from resentencing under the Act, the court shall deny appellant's petition for recall of sentence. If the court

[7] As we have explained, the nonpublished portion of this court's opinion was not before the superior court, and it is not part of the instant appellate record, to determine whether the court's findings are supported by substantial evidence. We presume that the parties might obtain the entirety of the opinion and trial record in order to include these documents as exhibits to the pleadings filed on remand, as to whether appellant should be resentenced or he was armed with a firearm.

determines appellant is eligible for resentencing, the court shall conduct further proceedings as specified in section 1170.126, subdivision (f).

DISPOSITION

The trial court's order is reversed. The matter is remanded for a new hearing and determination on appellant's eligibility for resentencing pursuant to section 1170.126.

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POOCHIGIAN, Acting P.J.

WE CONCUR:

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PEÑA, J.

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BRIAN L. MCCABE, J.*

* Judge of the Merced Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.